

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.570 OF 1993

1. Govardhandas Odhavji Dhakan,
2. Ratilal Odhavji Dhakan,

Both of Bombay, Indian
Inhabitants, residing at
Flat No.11, 3rd Floor,
Vatika, Vile Parle, Vatika
Co-op.Hsg.Soc.Ltd., Baptista
Road, Vile Parle (West),
Bombay - 400 056.

.. Petitioners.

V/s.

1. S.K. Laul,
2. S.C. Tiwari,
3. C.M. Betgeri

Members of the Appropriate
Authority constituted under
the provisions of Section
269 UB of the Income-tax
Act 1961 and having their
office at Mittal Court, 3rd
Floor, 'A' Wing, Nariman
Point, Bombay - 400 021

.. Respondents.

Mr.Jitendra Jain with Mr.A. Mirazi i/by Shah &
Sanghavi for the petitioners.

Mr.R. Asokan for the respondents.

CORAM : F.I. REBELLO &
J.P. DEVADHAR, JJ.

DATED : 24TH SEPTEMBER, 2007.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. Whether the Appropriate Authority was

justified in passing the impugned order on 25/2/1993 under Section 269 UD (1) of the Income Tax Act ('the Act' for short) for purchase of Flat No.11 (3rd floor) Vatika, Vile Parle Vatika CHS Limited, Baptista Road, Vile Parle (West), Bombay 400 056 ('the said flat' for short) is the question raised in this petition.

2. The relevant facts are that, by an agreement dated 21st November, 1988, the petitioners had agreed to purchase the said flat for consideration of Rs.17,21,000/-. On an application made in Form No.37-I, the Appropriate Authority passed an order under Section 269 UD (1) of the Act on 27-10-1989 for purchase of the said flat without giving any opportunity of hearing to the petitioners. On a Writ Petition bearing No.3216 of 1989 filed, this Court by an order dated 16-12-1992 set aside the order dated 27/10/1989 and directed the Appropriate Authority to decide the matter afresh in the light of the directions given by the Apex Court in the case of C.B. Gautam V/s. Union of India reported in 199 I.T.R. 530.

3. Accordingly, a show cause notice was issued to the petitioners on 1-1-1993 seeking to purchase the said flat on the basis of the three sale

instances set out therein. The petitioners by their reply dated 30-1-1993 objected to the purchase of the said flat under Section 269 UD (1) of the Act. By the said reply, the Appropriate Authority was called upon to furnish a copy of the report regarding valuation of the property. Admittedly, copy of the valuation report has not been furnished. Thereafter by the impugned order dated 25-2-1993, the Appropriate Authority once again sought to purchase the said flat under Section 269 UD(1) of the Act. Challenging the said order, present petition is filed.

4. Mr.Jain, learned counsel appearing on behalf of the petitioners submitted that the impugned order suffers from serious infirmities and is liable to be quashed and set aside because, firstly, the Appropriate Authority has not determined the fair market value of the said flat so as to satisfy the test of difference of 15% criteria. Secondly, out of three sale instances referred to in the impugned order, the first sale instance though relatable to the flat in question, the difference in the price variation being less than 15%, the said flat could not be purchased based on the first sale instance. As regards the second and third sale instances are concerned, they pertained to the flats situated at

Vile Parle (East) which are not at all comparable with the flat in question and, therefore, the impugned order cannot be sustained based on second and third sale instances set out in the impugned order. Accordingly, Mr.Jain submitted that the impugned order passed in violation of the dictum laid down by the Apex Court in the case of C.B. Gautam (supra) is liable to be quashed and set aside.

5. Mr.Asokan, learned counsel appearing on behalf of the revenue, on the other hand supported the order of the Appropriate Authority. He fairly stated that prior to the decision of this Court in the case of Vimal Agarwal V/s. Appropriate Authority reported in 210 I.T.R. 16, there was no practise of determining the fair market value in respect of property purchased under Section 269 UD(1) of the Act. He submitted that in the present case, petitioners have not furnished any sale instance in support of their contention. In these circumstances on the basis of sale instances on record, the Appropriate Authority was justified in passing the impugned order.

6. Relying on the decision of this Court in the case of Smt.Vimaladevi Maheshwari V/s. S.K. Laul

reported in 208 I.T.R. 734 (Bom), Mr.Asokan submitted that the purchase order passed after considering the material on record cannot be interfered with unless the findings of the Appropriate Authority are perverse. In the present case, the impugned order has been passed by the learned Members of the Appropriate Authority after inspecting the flat and after hearing the petitioners. Accordingly, Mr.Asokan submitted that no interference is called for and the petition is liable to be dismissed.

7. On careful consideration of the rival submissions, we find it difficult to sustain the impugned order. In the present case, this Court had remanded the matter back to the Appropriate Authority with a specific direction to decide the matter afresh in the light of the directions given by the Apex Court in the case of C.B.Gautam (supra). In C.B.Gautam's case the Apex Court categorically held that Chapter XX-C can be resorted to only where there is significant under valuation of the property to the extent of 15% or more in the agreement of sale, as evidenced by the apparent consideration being lower than the fair market value by 15% or more. Admittedly, there is no finding recorded in the impugned order to the effect that there is under

valuation to the extent of 15% or more of the fair market value. Thus, the impugned order passed in breach of the mandate given by the Apex Court in the case of C.B. Gautam (supra) cannot be sustained.

8. Apart from that, from the impugned order, the Revenue could not demonstrate that there is under valuation to the extent of 15% or more. As pointed out by Mr.Jain, learned counsel for the petitioners, the first sale instance referred to in the impugned order is no doubt situated at Vile Parle (West) and it could be considered as an comparable instance. However, difference in sale price between the flat set out in the first sale instance and the flat in question is only about 11%. As held by the Apex Court in the case of C.B. Gautam (supra) Chapter XX-C can be resorted to only if the under valuation is 15% or more than the fair market value. Therefore, in the facts of the present case based on the first sale instance set out in the impugned order, where the difference in the sale value is only about 11%, the Appropriate Authority could have not have purchased said property under Chapter XX-C of the Act.

9. As regards second and third sale instances are concerned, those flats are situated at Vile

Parle (East) whereas the flat in question is situated at Vile Parle (W) and, therefore, the 2nd and 3rd sale instances referred to in the impugned order cannot be said to be comparable instances. In any event, as held by this Court in the case of Vimal Agarwal V/s. Appropriate Authority reported in 210 ITR 16, unless the fair market value of the property in question is determined in the light of all the attending circumstances, it is not only difficult but impossible to draw inference of under valuation. In the present case, there is nothing on record to show as to how the second and third sale instances are comparable with the property in question. Moreover, there is nothing on record to show that after considering the merits and demerits of the sale instances with the property in question, the appropriate authority had come to the conclusion that there is undervaluation by 15% or more than the fair market value. Reliance placed by the learned counsel for the Revenue on the decision of this Court in the case of Smt.Vimaladevi (supra) does not support the case of the Revenue, because unlike in Vimpladevi's case, we find that the failure to determine the fair market value before passing the order is in breach of the law laid down by the Apex Court. Apart from that, even on the basis of the sale instances set out in the impugned order, the

revenue could not demonstrate that in the present case there is undervaluation by 15% or more than the fair market value. Thus the decision relied upon by Mr.Ashokan is distinguishable on facts.

10. For all the aforesaid reasons, in our opinion, we have no option but to quash and set aside the impugned order dated 25th February, 1993.

11. Accordingly, the petition succeeds. The impugned order is quashed and set aside. Rule is made absolute in above terms. However, there shall be no order as to costs.

(F.I. REBELLO, J.)

(J.P. DEVADHAR, J.)